



IN THE SUPREME COURT  
OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY,  
a corporation,

Plaintiff,

vs.

PIMA MINING COMPANY, a  
corporation; ANDREW L.  
BETTWY, as State Land  
Commissioner and THE STATE  
LAND DEPARTMENT, a department  
of the State of Arizona,

Defendants.

NO. 11439

RESPONSE TO PIMA'S  
ANSWER AND MEMORANDUM

THE DEFENSES OF ESTOPPEL AND LACHES

The record does not sustain Pima's claims of knowledge on the part of Farmers Investment Company's executives. If Farmers Investment Company should have known that Pima was unlawfully trespassing upon its property rights prior to employing counsel, certainly Pima also must be held to knowledge that it was acting in plain disregard for the water law of the state.

Jarvis vs. State Land Department held:

"Silence does not operate as an estoppel where the means of knowledge is equally available to both parties. Cityco Realty Co. v. Slaysman, 160 Md. 357, 153 A.278, 76 A.L.R. 296; Anno. 304, 310. Estoppel by silence cannot be invoked by one who knows the true character of his own title. Certainly, petitioners were under no duty to protect Tucson by advising it as to what its legal rights were. To make the silence of a party operate as an estoppel, there must have been a duty to speak. Ray v. First National Bank of Arizona, 38 Ariz. 337, 356 P.2d 691. Remaining passive and silent does not deprive a person of his legal rights. In addition there must be some act to induce or encourage another to alter his position. Grant County Deposit Bank v. Green, 6 Cir., 200 F.2d 835."

Additionally, this action is only concerned with State Lease No. 906 executed in 1966 and State Leases 907-01, 907-02 executed in 1968. It is not a de nova proceeding. It seeks review of the granting and denial of summary judgment motions on the record as made and considered by the trial court. Taking of evidence has been concluded.

#### THE LIMITATIONS DEFENSE

This action concerns use of water under a state lease executed in 1966 and of a state lease for a tailings pond executed in 1968.

The remaining affirmative defenses present matters of law which are without legal merit and in any event do not go to the question of whether this Court should accept jurisdiction.

The book is closed insofar as this phase of the matter before Judge Royalston is involved. He has rendered judgment on facts he considered adequate.

#### THE DUMPING OF WASTE ISSUE

Pima states that this issue was not raised before Judge Royalston. It is true that Farmers Investment Company had not raised the issue. But Pima did.

Farmers Investment Company alleged in Count Four that the use of groundwater by Pima by pumping from the underground and transporting it outside the Critical Area was unlawful. Pima alleged its use was lawful and moved for summary judgment finding its use to be lawful.

In support of that Motion Pima filed the Affidavit of George Komadino, its Vice President and General Manager of its Pima County operations. We have reproduced paragraphs 5

and 7 of that Affidavit of May 28 of former Investment  
company's retention and supporting Memorandum. The two  
leases, 907-01 and 907-02 Exhibits B and C respectively,  
are there plainly relied upon as is the use thereof as a  
waste dump for the mine tailings.

Pima in its attempt to justify its use of the groundwater  
relied upon these two leases.

Judge Royalston upheld their water use as reasonable and  
hence we must assume he considered this use under leases  
907-01 and 907-02 having and beneficial use. In fact, former  
Investment company did not appreciate that this use was being  
made by Pima until the Affidavit of Mrs. Roman was filed.  
See Affidavit of Mark Wilmer, Exhibit D.

The material facts are clear and undisputed. The law is  
clear unless Jarvis' and others are to be relieved.

Dated this 21st day of January, 1964.

Respectfully submitted,

SMITH, H. WILSON

By: Mark Wilmer  
Loren E. Lounce, Jr.

By: Mark Wilmer  
Attorneys for Plaintiff  
Elko Valley Center  
Phoenix, Arizona 85016

MARK WILMER, Plaintiff

Mark Wilmer, being first and second named

Minors of the former Investment company, former Investment  
company. The fact that Pima has been in possession of and under  
state leases 907-01 and 907-02 is undisputed.

as a tailings pond was first brought to his attention by the statements in the Affidavit of George Komadino filed in support of Pima's Motion for Summary Judgment. Affiant investigated this use and obtained copies of State Lease 907-01 and 907-02 (Exhibits B and C) attached to the Petition for Special Action. Affiant is informed and believes and accordingly states that while executives of Farmers Investment Company knew of the general location and use of state land by some of the Mining Company defendants, no executive of Farmers Investment Company knew that such use may have been an illegal use until so advised by affiant.

  
\_\_\_\_\_  
MARK WILMER

Subscribed and sworn to before me this 27 day of January, 1974.

\_\_\_\_\_  
Notary Public

My Commission Expires:

My Commission Expires Jan. 29, 1977.



STATE OF ARIZONA )  
 )  
COUNTY OF MARICOPA )

I Craig Swick hereby certify:  
Name

That I am Reference Librarian, Law & Research Library Division of the Arizona State  
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439, Response to Pima's Answer and Memorandum, January 21, 1974. Page 267-270.

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

  
Signature

Subscribed and sworn to before me this 12/12/2005  
Date

Etta Louise Murie  
Signature, Notary Public

My commission expires 04/13/2009  
Date

